FOR ARGUMENT

Supreme Court, U.S.
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# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-119

STATE OF WASHINGTON, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,
Respondents.

No. 78-139

PUGET SOUND GILLNETTERS ASSOCIATION, et al.,
Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
Respondent.

## BRIEF OF RESPONDENT, YAKIMA NATION

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## BRIEF OF RESPONDENT, YAKIMA NATION

### JURISDICTION

Petitioners invoke jurisdiction of this Court pursuant to 28 USC §1254(1) and 28 USC §1257(3). Petitioners did not supply the time factor upon which jurisdiction rests. 28 USC §2101(c) provides the applicable time factor of ninety days. Petitions for certiorari in 78-119 and 78-139 seek review of the decision

of the Court of Appeals for the Ninth Circuit in *United States v. Washington*, 573 F.2d 1123 (filed April 24, 1978). Petition in 78-119 was filed with this Court on July 21, 1978 (88 days after entry of the Circuit Court's decision) and is timely. Petition in 78-139 was filed with this Court on July 26, 1978, (93 days after entry of the Circuit Court's decision) and appears *not* to have been timely filed. Rule 34. (Respondent's filing dates from 47 L. W. 3156).

Both petitions seek to review the decision of the Court of Appeals for the Ninth Circuit in *United States v. Washington*, 520 F.2d 676, filed on June 4, 1975. Petitions 78-119 and 78-139 were filed with this Court over three years after the entry of the Circuit Court's decision on June 4, 1975. Petitions to review this decision were not timely filed.

## STATUTORY PROVISIONS

In addition to the other statutes called to this Court's attention, we set forth:

*28 USC §2101(c)*

> Any other appeal or writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.



## QUESTIONS PRESENTED

The Yakima Nation adopts the questions presented by other tribal respondents, as limited by the petitions herein, as the questions presented for review with the indicated additions. The Yakima Nation's brief is supplemental to the brief of the other tribal respondents and is submitted because of the novel findings regarding the Yakima Nation in the District Court and that court's determination of Yakima's tribal self-regulation. This brief is also submitted to raise the issues of collateral estoppel or the law of the case as between Washington and the Yakima Nation as that both are parties to parallel litigation involving the same material issues presented for review.

The additional questions presented are:

1. Is the District Court's determination of the treaty reserved fishing rights of the Yakima Nation and other Indian tribes, which was affirmed by the decision of the Court of Appeals for the Ninth Circuit on June 4, 1975, subject to review herein? Are these June 4, 1975 determinations: (a) the law of the case; (b) Res judicata, or (c) not subject to review as petition for review was not timely filed.

2. Is petitioner Washington, collaterally estopped from raising material issues regarding the Yakima Nation, when those same material isues have been

finally determined by a Circuit Court of Appeals for the Ninth Circuit in parallel litigation between the Yakima Nation and Washington?

## STATEMENT OF THE CASE

Petitioner-Washington's Opening Brief, presents this Court with material upon which this Court cannot properly rely and presents Respondents with a task that unfairly burdens their duty to this Court. Rule 40(1)(e) of the Revised Rules of this Court clearly provides that there shall be:

> "A concise statement of the case containing all that is material to the consideration of the question presented, with appropriate references to the appendix, e.g. (A. 12) or to the record, e.g. (R. 12)"

This Court's requirements as to appendix and record references is emphasized by Rule 40(2). This rule provides that every reference to the appendix or the record in any part of the brief "must be accompanied by the appropriate page number", and if to an exhibit, both by the page number "at which the exhibit appears and which it was offered in evidence . . . e.g. (P1. Ex. 14, R. 199, 2134)." The bulk of Washington's Statement of the Case contains statements outside the record. In addition, many statements are referenced improperly under this Court's rules. If the clarity of this Court's rules does not make Washington's performance inexcusable, the depth of experience of the Attorney General before this Court should. Respondent-Confederated Tribes and Bands of the Yakima Indian Nation hereinafter called "Yakima Nation", in its Statement of the Case will ignore Washington's statements outside the record and not properly referenced. The Yakima Nation petitions this Court to strike or ignore portions of Washington's Statement of the Case not in compliance with the requirements of this Court's rules.



Likewise, Washington's Statement of the Case is not a concise or fair Statement of the Case. This will be readily seen when this Court compares the assertions contained in Washington's statement with the referenced source where appropriate references are made. Washington overstates or incorrectly states the record below.

Further, Washington's Statement of the Case is incomplete as regards Respondent - Yakima Nation. In supplying these material facts, it is to be noted that much of the Yakima Nation's Statement of the Case is based on the findings of fact below. These findings of fact are uncontroverted. (A.154,FF. 149).

The Yakima Nation was formed out of the fourteen tribes and bands that were parties to the *Treaty with the Yakimas*. It is a recognized, currently functioning Indian tribe and maintains a tribal government on the Yakima Indian Reservation. At the time of the origi-

nal trial, the Yakima Nation had 6,040 enrolled members, enrolled pursuant to an Act of Congress. (A.155,-FF. 150).

At the time the *Treaty with the Yakimas* was negotiated in 1855, the United States promised and the Indians understood, that the Yakimas would forever be able to continue the same off-reservation fishing practices as to *time, place, method, species* and *extent* as they had or were exercising. (A.157,FF. 156).

The Yakimas at the time of the treaty lived in a food gathering culture. They existed on game, fish, roots, berries, and some cultivated vegetables. Of these foods, fish was a major part of their diet and they landed salmon, steelhead, trout, mussels, eel and other miscellaneous fish. Salmon, both fresh and cured, was a staple in the food supply of the Yakimas. Their diet required a large variety in the kind of salmon and fish caught. The Yakimas consumed large quantities of fish and traded in fish not consumed. (A.155,FF.151; A.156,FF.154). At treaty times the Yakimas made landings at fisheries located in the Puget Sound area. These fisheries in the area of this case's inquiry included the waters of the Snoqualmie, Snohomish, Green, Puyallup, Nisqually, Stuck, Duwamish, White, Carbon, Black Rivers and their tributaries. (A.156, 147,FF.-154). The methods used by the Yakimas to catch salmon and steelhead were very efficient. The Yakimas



used traps, weirs, nets, gillnets, baskets, and seines to land salmon and steelhead. (A.156FF.152).

In contrast, at treaty time and for a period thereafter, a non-Indian marine fishery did not exist and non-Indian fishing was minimal. This non-Indian fishing posed no threat to the abundance of fish resources being harvested by Indian fishermen (A. 102-103, FF. 8).

In post-treaty times, the Yakimas continued to fish as they had. During territorial times, officials of the United States and the Washington Territory supported the Yakima Nation's right to enjoy the off-reservation fisheries as the Yakimas had prior to the execution of the treaty. (A. 157-158, FF.157). However, Indian off-reservation fisheries have not been supported by state officials. In 1966, the State of Washington commenced multiple arrests of Yakima Indians which caused them to decrease their fishing effort in the Puget Sound area. The Yakima Nation has been embroiled in extensive litigation concerning fishing areas outside this case area as a result of the State's concerted efforts of arrest and harrassment. The Yakima Nation has been successful in such litigation, but the time and money expended has required the Yakima Nation to limit the fishing efforts of its Puget Sound fishermen. (A158, FF. 158).

The Yakima Nation has always regulated its fisher-

men for conservation purposes. (A.158, FF.159). The Yakimas continue as a religious rite not only the first salmon ceremony, but the basic underlying salmon culture. This salmon culture is based on a religious concept of interdependence and relatedness of all living things. This concept was and is a dominant feature of the Yakimas' lifestyle. The Yakima Indians are tenacious in adhering to these past customs and traditions. (A.157, 159; FF. 157), 162). The Yakimas have adopted and effectively enforced tribal fishing regulations which in some material respects are more restrictive than Washington's regulations (A.86).

In contrast, non-Indian salmon fishing in the Puget Sound area was unregulated until 1890. It was 1915 before the first state fisheries code was written, passed and signed into law. (EX. JX-2A. Table 25, Section 2.3.1). It was not until 1925, that the State of Washington commenced regulating landings of steelhead as a game fish. With minor exception, state regulation did not provide for Indian treaty fishing. (EX. JX-2A, Section 2.3.2). Beyond a daily sports limit, the State of Washington did not limit the landings of salmon in off-shore marine waters where the bulk of non-Indian landings are made. (A.167, FF185). In contrast to the Yakima Nation lifestyle, the non-Indian lifestyle has caused severe limitation and reduction of the salmon resource because of watershed alteration, water storage



projects, industrial development, channel alteration and residential development. (EX. JX-2A §1.5.1, §1.5.2, §1.5.3, §1.5.4, §1.5.5).

The Yakima Indians continue to live close to the poverty level and have not reached economic or social parity with non-Indian citizens of the State of Washington. The Yakima Indians continue to be very dependent upon anadromous fish to sustain their way of life. Large numbers of the Yakima Nation follow this pursuit for subsistence and livelihood. (A.106,FF 163).

In the initial decision, the District Court held and the Circuit Court affirmed, that the Yakima Nation and the Quinault Tribe qualified for self-regulation, free from any state regulation. (A43, 48). As a part of a general scheme to provide Indian fishermen with their treaty share, the District Court held, and the Circuit Court affirmed, that Washington must manage its non-Indian fisheries so as to permit a harvest by Indian treaty fishermen and a necessary escapement to perpetuate species and runs. (A. 49, 52). The District Court, which retained jurisdiction, anticipated that Washington, who promised to abide by the Court's necessary determined allocation, (R66, 83, 84), would make significant reductions in the non-Indian fishery in compliance with the objectives of the judgment. These objectives were affirmed by the Circuit Court and this Court denied certiorari. (Petition A-2, A428). The

District Court in anticipating compliance was unfortunately incorrect. Enforcement became a problem. Enforcement is a problem because Washington, its courts, and the non-Indian fishermen have never fully accepted the principal that treaty rights can be claimed by a politically impotent minority. Before 1977, the State enforced the District Court's order grudgingly at best. The orders from which Washington appeals is a result of a break down in State law enforcement in 1977. In 1977, the State agencies had, with well publicized reluctance, issued fishing regulations, which, if enforced, would have met minimal requirements of the District Court's judgment as affirmed. In the few instances where Washington cited non-Indian fishermen, the applicable law enforcement authorities refused to prosecute violations of the regulations. More importantly, the Washington Supreme Court attempted to strip the Washington regulatory agencies of their power to comply with the judgment of the federal courts. With this support, Washington's regulatory authorities witthdrew its regulations and issued new ones which made no attempt to protect Indian treaty rights in the fishery. This situation led the District Court to cease its attempts to work through Washington's regulatory agencies and, instead, to directly undertake enforcement of its decree. (Washington's Petition A-10).



The Yakima Nation has been engaged in parallel litigation with Petitioner-Washington regarding off-reservation treaty rights on the Columbia River. In 1969, the District Court for the District of Oregon in *Sohappy vs. Smith; United States vs. Oregon*, 302 F. Supp. 899, determined that the State of Oregon could not regulate treaty fishing unless certain conditions were met. The District Court further determined that certain treaty Indians, including the Yakima Indians, have an absolute right to their off-reservation fishery, and are entitled to a fair share of the fish produced by the Columbia River system. No appeal was taken from that decision.

In 1974, under the District Court for the District of Oregon's retained jurisdiction, Washington was permitted to intervene as a party in the Columbia River case and moved to enjoin treaty fishing until permitted by the regulations of the States of Oregon and Washington. Washington, as a condition of intervention, agreed to be bound by the 1969 decision. Injunctive relief was denied. The District Court for the District of Oregon, as a clarification of a "fair share" of the fish in the 1969 judgment amended the 1969 judgment to provide that the Indian treaty fishermen were entitled to a 50% share. Washington appealed the denial of the injuction, the amendment of the initial judgment and attempted to appeal the 1969 judgment. The Circuit

Court dismissed the appeal regarding both the denial of injunction and the attack on the 1969 judgment and affirmed the District Court of Oregon's 50% allocation amendment of the 1969 judgment. No further review was sought by the parties. *Sohappy vs. Smith; United States vs. Oregon and Washington*, 529 F.2d 570 (1976).

Thereafter, in 1977, the States of Oregon and Washington, the United States and the Columbia River treaty tribes (including the Yakima Nation) reached an agreement concerning allocation of fish runs on the Columbia River, and this agreement was incorporated into a decree on February 8, 1977, by the District Court for the District of Oregon. Shortly thereafter in 1977, Washington's fish management agencies and judiciary claimed that Washington had no authority to agree to the plan and contended that Washington could not fulfill its obligation under the Washington approved plan and decree and regulate non-Indian fishermen on the Columbia River. Pursuant to requests by the United States, Oregon, and the treaty tribes, the District Court of the District of Oregon enforced the decree by restraint against non-Indian violators. Washington was a party to these proceedings and the subsequent appeal. The Circuit Court, in the same decision now under review by Washington's petition, affirmed the District Court of Oregon's authority to enforce its decree by re-



straint of non-Indian violators of the plan and decree. *Columbia River Fishermen's Protective Union, Inc. et al. vs. United States District Court for the District of Oregon*, 573 F.2d 1123 (1978). (Washington's Petition A1). Washington and the Yakima Nation were parties in these cases involving authority of a District Court to enforce its orders over non-parties to the decree in the consolidated appeal involving both the Columbia River and the Puget Sound fishing areas in the two district courts and the Court of Appeals. Washington has obtained review contesting the authority of the District Court for the Western District of Washington to enforce its decree in this pending petition, but has not requested review of the authority of the District Court of Oregon to exercise the same authority in the Columbia River area. The State of Oregon supported the District Court action.

## SUMMARY OF ARGUMENT

The affirmed 1974 judgment of the United States District Court for the Western District of Washington determining the extent of reserved treaty fishing rights in the Puget Sound area and allocating Indian and non-Indian shares is the law of the case.

Washington is collaterally estopped from raising material issues regarding allocated shares and enforcement powers as these issues have been finally deter-

mined in parallel litigation between Washington and the Yakima Nation.

This Court has provided that treaties should be interpreted as the Indians understood them, not according to technical rules. The District Court's interpretation conforms with this rule and is supported by the record.

The percentage allocation method, suggested by Washington and adopted by the District Court, does not prejudice the non-Indian fishermen and is within the power of the lower courts.

Necessary supplemental enforcement orders to protect the treaty allocation are the duty of the federal courts. The District Court orders are a reasonable action in furtherance of that duty.

Treaty rights and their preservation are a federal purpose under the *Constitution* and not within the powers of a state.

Washington, and its allies, by past action, have forfeited any right to equitable relief. Washington should not be considered as the primary management agency.

## ARGUMENT

### 1. Introduction

The recalcitrance and extra ordinary machinations of Washington and the concerted official and private efforts to frustrate a decree of a federal court have been duly noted by the Circuit Court below. (Washington's Petition A3, 9). This Court will undoubtedly wish to comment on these *acts of nullification.*[1] The Yakima Nation is concerned about these concerted attempts to frustrate the national purpose. The Yakima Nation is similarly concerned about the jeopardy to the resource caused by the unregulated non-Indian fishing on diminishing runs which Washington decries but approves in its submission to this Court. Washington's approval can only find precedent in the regulation of the non-Indians harvest. This management scheme is beyond the Yakima Nation's comprehension. Let us assume that one had a herd of cattle from which the young would go from the home ranch to free range and return to the home ranch fully mature in a few years for cropping and reproduction. Let us further assume that certain species in the herd required limited cropping to save the returning mature members of that species for reproduction. On these premises, a person who would believe that the preferred method of harvest would be to go out on the range and crop the herd by a method which cannot select as to maturity or species, would be considered horticulturally improvident. However, Washington fosters a system of off-shore and

[1] Washington and its allies present actions are so similar to the actions of the Southern States in the first half of the Nineteenth Century; that "nullification" is clearly the word to be used. See: Hendrick, *Bulwark of the Republic,* "The Rise and Fall of Nullification", pp. 191-258. At this early time, "nullification" was defined as "anarchy reduced to a system." (supra, p. 255). We adopt that definition.

marine harvest on mixed species stocks containing commingled immature and mature members of inadequate and diminished species rather than a system harvesting only returning mature members in freshwater by methods that can protect species needing additional enhancement.[2] These non-Indian management decisions are made necessary by political judgments as to who can share in the non-Indian allocation. Political judgments call for decisions that are contrary to the laws of the Creator protecting the resource which have been followed by the Yakimas from time immemorial. The Yakima Nation believes these rules based on the nature of the resource would best protect the resource created for the indigenous inhabitants of this land. However, in a political world (domestic and international), the Yakima Nation and this Court have to accept (but not necessarily respect) political decisions legally made. However, the Yakima Nation petitions that this Court recognize that most of Washington's management decisions are primarily political and ignore conservation or preservation.

Given the existence of a reserved treaty right, it is obvious that percentage allocation is a necessary tool for protecting reserved rights and perpetuating runs. No other method, as one of the attorney's for the State

[2] This system of harvest is seen as even more improvident during these years when energy conservation is an announced national purpose.



of Washington stated in his opening remarks at the original trial (R. 83), will allow justice to be done, permit harvests to be managed and allow escapement goals to be reached. Percentage allocation has been finally and legally established by the federal courts having exclusive constitutional authority to make a determination in the area of national treaties. While we suggest that the federal courts might well devise a management scheme that would better serve the preservation of the fisheries than Washington, they have not done so. To so do, would require the federal courts to make political decisions as to how, by whom and where the respective Indian and non-Indian allocations would be harvested. The federal courts have neither the inclination or capacity to make these intertribal, domestic and international political decisions.

Unfortunately, there have been times when it has been necessary for the federal courts to restrict harvest by certain Indian and non-Indian fishing groups. These decisions have been firmly based on perpetuation of the resource or in protection of a previously legally determined allocated share. The fact that these decisions have been made necessary by political decisions does not make the federal courts the fish management agency as Washington contends. The actions of the District Court under review, resulted from Washington's failure to comply witth the 1974 decision of the

District Court. These federal court actions have been the only effective method available to protect the rights of the parties and the resource.

The failure of Washington to comply with the District Court's decision has led the Yakima Nation to restrain its fishermen from fishing in the Puget Sound area. This hampers the Yakima Nation's enjoyment of declared rights. The Yakima Nation continues to be concerned about the Washington incited lack of order in the Puget Sound area and the obvious damage to the resource resulting from the illegal fishing. Washington by its nonfeasance and misfeasance may have forfeited any right as a management agency, but the federal courts are limited to the protection of respective shares and the resource, and have correctly confined their actions to this legitimate purpose.

**2. Washington Cannot now Attack Lower Courts Interpretation of the Yakima Treaty**

The primary thrust of Washington's petition and brief is an attack on the affirmed 1974 Judgment of the United States District Court for the Western District of Washington. This decision determined the extent and nature of the off-reservation reserved treaty fishing rights of the Yakima Nation and other tribal respondents in Puget Sound. This 1974 judgment was affirmed by the Court of Appeals for the Ninth Circuit. (520 F. 2d 676 (1975)). In 1976, this Court declined



to review this determination (cert. denied, 423 U.S. 1086).

This Court should not review the 1975 affirmation. The 1974 judgment is *res judicata* and the law of the case. In reaching this conclusion, your writer is aware that this Court reviewing a *final* judgment on certiorari will reach back and review the interlocutory proceedings below. This is the practice of this Court even though an attempt to obtain this Court's review of these interlocutory proceedings was not successful. However, it does not follow that this Court will reach back and review a final judgment when reviewing an enforcement order on certiorari.

This Court has pointed out in *Hughes Tool Co. vs. Trans World Airlines*, 409 U.S. 363 (1973) at Note 1, the necessity of a "final judgment" before previous interlocutory orders may be reviewed. Although the 1974 judgment was a "final judgment," the Yakima Nation contends this Court lacks jurisdiction to review the 1974 judgment now. Congress has provided under its authority contained in Section 2, Article III of the Constitution, that a writ of certiorari intending to bring any such judgment or decree or proceeding before this Court, shall be taken within ninety days from the entry of judgment, order or decree. 28 USC §2101(c). This is a jurisdictional rule. This Court has said, "the purpose of statutes limiting the period of appeal is to

set a definite point of time when litigation shall be at an end, . . . any other construction of the statute would defeat its purpose." *Matton Steamboat Co. v. Murphy*, 319 U.S. 414, 415 (1943).

As regards the Yakima Nation, Washington is collaterally estopped from attacking the District Court's determination of the extent of the Yakima Nation's off-reservation reserved treaty fishing rights, and the power of the district court to issue orders protecting those rights. Washington is a party to a case in which the affirmed judgment provides for a 50% allocation to the Yakima Nation under the *Treaty with the Yakimas*.[3] No appeal or review of that determination was sought. In the same Circuit Court case that Washington wishes reviewed, the Circuit Court upheld the authority of the Oregon District Court to enforce the allocation of treaty and non-treaty shares in Columbia River waters.[4] Both Washington and the Yakima Nation were parties to those proceedings and no review of that holding has been sought by Washington in this Court.[5] Since these same issues have become final in

[3] *United States v. Oregon and Washington*, 529 F.2d 570 (1976).

[4] *Columbia River Fishermen's Protective Union, Inc. et. al v. United States District Court for the District of Oregon*, 573 F.2d 1123 (1978) (Washington's Petition A1).

[5] We suggest that Washington does not seek review because review would show that another state (Oregon) does not support its position regarding enforcement. In this case, Oregon supported the power of the federal courts to enforce its allocation decree. Further, since the District Court of Oregon decree being enforced was agreed to by Washington, it would further indicate to this Court that Washington's promises leave something to be desired.



parallel legal proceedings between the same parties, Washington is collaterally estopped from raising these issues here. *Commissioner vs. Sunnen*, 333 U.S. 591, (1948).

### 3. Holdings of the Lower Court's Should be Affirmed

The applicable portion of Article III of the *Treaty with the Yakimas*, provides:

> "The exclusive right of taking fish in all streams where running through or bordering said reservation is further secured to said Confederated Tribes and Bands of Indians, as also the right of taking fish at usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them . . . "

In executing the 1855 *Treaty with the Yakimas*, the United States promised, and the Yakima Nation understood, that Yakimas would forever be able to exercise off-reservation fishing practices. Washington does not contest that the parties to the *Treaty with the Yakimas* understood that the treaty perpetually reserved, as to *time*, *place*, *method*, *species* and *extent*, the existing off-reservation fishing practices. It is uncontested that, at treaty time, four hundred Yakima members were landing salmon and steelhead in sizeable quantities in the Puget Sound area by traps, weirs, nets, gillnets, baskets and seines. The Yakima Nation relied on these promises and they were a material and basic part of the *Treaty with the Yakimas*. (A 159, FF 156). The Yakimas are dependent upon fishing to sustain them-

selves and have traditionally conducted their fishery in a regulated manner that does not impair or endanger the resource. (A 158-159).

In the questions presented, Petitioners have not sought review of the decreed right of the Yakimas to continue the exercise of their fishery without state regulation. Further, the holding below, that the Yakima Nation may continue its treaty reserved, and tribally regulated, off-reservation fishery without state regulation, is supported by the uncontested record and by previous decisions of this Court. The allocation method selected by the District Court to protect the reserved treaty fishery is within the District Court's discretion and is supported by the record below and previous decisions of this Court.

In *United States vs. Winans*, 198 U.S. 371 (1905), this Court held that the off-reservation fishing rights of the Yakima Nation in Article III were part of the larger rights possessed by the Yakimas "upon the exercise of which there was *not a shadow of impediment.*" This Court held that the provisions of a share for the territorial citizens in Article III was a grant from the Yakima Nation to the citizens and not a grant by the United States to the Yakima Nation. This Court then determined that this grant of a share to citizens did not permit citizens to use of methods of harvest, or allow them means of exclusion that would preclude the Yakimas from exercising their reserved treaty fishing rights. In so holding, this Court expressly rejected Washington's current contention that treaty Indians exercising their treaty rights are bound by state law like any other citizen. This Court construed Article III as the Indians understood it, without regard to technical rules.



Subsequently, in *Seufert Brothers Co. v. United States*, 229 U.S. 198 (1919), this Court again held that Article III should be construed as understood by the Yakima Nation without regard to technical rules. This Court further held that these off-reservation reserved treaty rights were not limited to the area ceded to the United States by the *Treaty with the Yakimas.*

Thereafter, in *Tulee v. Washington*, 315 U.S. 681 (1942), this Court for the third time held that Article III should be interpreted in accordance with the meaning it was understood to have by the Yakima Nation's representatives at the Treaty Council.

The understanding by the Yakima Nations representatives at the Walla Walla treaty council as to what the treaty provided is to be found in District Court's Finding of Fact 156. The District Court found that the United States' promises coincided with what the Yakima Nation understood was provided in the *Treaty with the Yakimas.* Namely, that the Yakima Nation would *forever* be able to continue existing off-reservation fish-

ing practices as to *time, place, method, species* and *extent.* This finding, not controverted below or contested in this review, amply supports the holdings below that the Yakima Nation may continue its treaty reserved off-reservation fishery without state regulation under provisions that allocate the fishery to provide treaty Indians with the opportunity to exercise this reserved right.

As to state power to regulate Indian fisheries, the District Court below has analyzed the *obiter dictum* statements of this Court (A73-79) and points out that these statements should receive further analysis by this Court. It is clear that this Court's statement in *Tulee v. Washingon, supra,* that the state has power to impose non-discriminatory restrictions concerning the time and manner of fishing outside the reservation as are necessary for the conservation of the fishery, was clearly without the purview of the case. The only regulations at issue in *Tulee* were licensing requirements, and this Court held that the Yakima treaty forecloses any such regulation. There was no showing in *Tulee* nor is there in the instant case that any state regulation is necessary to preserve the fishery. Indeed, in the instant case, the record clearly shows that no state regulation is necessary, and petitioners have not raised this issue in their questions presented. The Yakima Nation contends, under the facts of *Tulee* and this case, that



the state may not regulate members of the Yakima Nation fishing in conformity with tribal regulations. *Winans* acknowledges that the Yakima Indians understood that there was not to be a "shadow of impediment" on the exercise of their reserved fishing rights. The Courts below found that the treaty Indians did not understand that their fishing rights would be regulated by others and that there was no reason for the State to regulate Yakima members. (A86). Petitioners have not sought review of that determination.

The Yakima Nation is very dedicated to regulation of their fisheries in order to protect the fishery. (A159, FF. 161). It is very necessary that this resource, upon which its members are dependent for their livelihood and way of life, be protected. The Yakima Nation respectfully suggests that the record clearly shows that they have the power and the interest to best regulate their fisheries. (A 86, 158-159, FF. 159-161). Their lifestyle and fishing culture further insure protection of the resource by the Yakima Nation. (A159, FF 162).

In contrast, Washington readily admits that it is unable to regulate its citizen fishermen (Washington's Brief, p. 8). Washington is just as quick to assess the blame for this lack of regulation and control. Washington contends this lack of control has resulted because the federal courts have given the "wrong an-

swer" in interpreting federal treaties. They promise they will properly regulate if this Court will only give the "right answer." Washington's proposed "right answer" is for this Court to ignore the promises made by the United States reserving to the treaty Indians their off-reservation fishery. It is Washington's continued failure to recognize the Indians reserved right protected by the law of the land that has created the current problem. This failure has resulted in "continued anarchy reduced to a system" which has unquestionably harmed the Yakima Nation and continues to do so. Washington has sought to excuse its continued harrassment of the Yakimas by contending they were regulating for conservation. Even under the most liberal interpretations of this Court's *Tulee* dicta, Washington has been unsuccessful in showing any necessity for the regulation of Yakima fishermen who are already tribally regulated in accordance with the Yakima Nation's conservation policies. (A158, FF. 158). However, Washington's continuing efforts and harrassment has previously resulted in a serious limitation of the Yakimas' exercise of their treaty rights in the Puget Sound area. (A158, FF. 158). The current resulting anarchy, fostered by Washington's failure to follow the law of the land, continues to limit the Yakima Nations' exercise of its treaty rights. The Yakima Nation is reluctant to permit its fishermen to



fish in Puget Sound until adequate control over the non-Indian fishery is obtained. These unsettled circumstances, Yakimas' concern for the resource, time and expense limitations, are all factors which continue to restrict Yakimas' exercise of their reserved treaty right.

It is obvious that if the Yakima Indians are to continue to pursue treaty time fishing practices, there must be an adequate fishery at their treaty reserved fishing places. The District Court seeks to protect this reserved treaty right by the allocation of shares. If no fish are available for harvest, reserved treaty rights become mere paper rights. The destruction or monopolizing of the fishery is just as much a breach of the treaty reserved fishing rights as is keeping treaty Indians from their fishing places. Certainly, such circumstances were not contemplated by the parties to the treaty. At treaty times, there was an abundance of fish available for harvest and non-Indian landings were minimal. (A102-103, FF. 89). It was not foreseen by the Indian hosts that permitting a share in the fishery to non-Indian citizens would create the shortages we have today. Indian hosts could not foresee that these new inhabitants would create an ecological crisis that would further damage the resource. Such results were beyond the experience of the Indians.[6] The Indian hosts

[6] At the trial below, counsel for Washington admitted that the consequences of non-Indian harvest and other factors reducing the resource could not have been foreseen by the Indians. R. 68.

had lived in this area for thousands of years and had shared the harvest without any danger to the continued availability of the resource. This area has previously supported a food gathering culture population many times the treaty time Indian and non-Indian population.[7] There was no non-Indian marine fishery and it was not conceivable that the Indian hosts could anticipate that non-Indian harvests away from their fishing places would some day limit the Indians right to fish at their reserved fishing places. It is difficult for the Yakima Nation even today, to believe that this society would foster a harvest system that focuses its effort in areas where immature and mixed species are indiscriminately harvested thereby limiting harvest on mature, segregated stocks in areas where landings can be economically made in furtherance of conservation principles. This is the situation that faced the District Court. The District Court was not considering an adequate fishery resource that had been successfully husbanded for thousands of years by Indian custom. The District Court had to equitably allocate shares of a resource that had been greatly reduced by the harvest and habitat management practices of non-Indians.

The District Court was further faced with the problems of insuring that enough fish to provide for the treaty reserved harvest would reach the treaty fisher-

[7] A.103, FF. 9.



ies and insure an adequate escapement to preserve the resource. Allocation of non-Indian and Indian shares was the method suggested by Washington's Department of Fisheries. Allocation of shares was the method of equitable adjustment adopted by the District Court and approved on appeal. Considering that non-Indian landings at Indian fisheries were minimal and considering non-Indian marine landings did not exist at treaty times, it is certain that the Indian parties to the treaty did not understand they were granting as large a share as is now allocated to non-Indians. Certainly, the Indians would not have understood that such a large share would be landed by non-Indians. The record demonstrates that the Yakima Nation understood that the permitted sharing of their reserved off-reservation treaty rights would not effect their existing fishing practices as to time, place, method, species and *extent.* At treaty times, Indians in this area had been fishing in common with each other without limiting the availability of fish for harvest. (A 105, FF. 13). As hosts, they had every right to anticipate respect for their primary use rights as was accorded by custom in this area. (A104-105, FF. 12-13). Washington's attack on the District Court's reliance on a dictionary in common usage at the time of the Treaty and the Court of Appeals reliance on common law rules regarding property rights, begs the question. Washington, after criti-

cizing the reliance by the Courts below on these technical rules, seeks to impose upon this case common law rules regarding fisheries not previously brought to the attention of the Courts below. The Yakima Nation sugguests that reliance on these sources can be of little help to this Court. The Yakima Nation, with no familiarity with the English language, could not be expected to know about, let alone understand what dictionaries, law treatises, and the common law provided. The record does not indicate that even the treaty negotiators had them in mind. What is important in determining the treaty reserved fishing rights was the understanding of the Indians as to what the treaty provided. In interpreting the Yakima Treaty, this Court has made it clear that the Indian's understanding is the proper basis for construing treaty clauses, not technical rules. *(United States vs. Winans, supra, Seufert Bros. Co. v. United States, supra; Tulee v. Washington,* supra). Based on this Court's announced rules of construction, any objection to reliance on these definitions and concepts belong to the Indian people. These definitions and concepts were used to accord the non-Indian fishermen a much greater share than Indians could have understood was provided by the *Treaty with the Yakimas.* To protect the exercise of the Yakimas' reserved treaty rights, the District Court had power to limit citizens fishing rights. *(United States v. Winans, supra,* at



384). Washington has not shown that the District Court's determination was an abuse of the District Court's power.

The District Court must continue to enforce its decree. Washington promises they can and will implement the Court's decision regarding allocation after receiving this Court's guidelines. Washington gave the same promise to the District Court. Washington then adopted, through concerted executive, legislative and judicial action or inaction, a course of action that has as its acknowledged purpose, the reduction of fully adjudicated treaty reserved fishing rights. Washington's repeated promises taxes our credulity. These promises should not be accepted nor relied upon by this Court. We clearly understand the federal court's reluctance to enforce its judgments by injunctive action. Such injunctive action by the District Court has serious practical limitations. However, until such time as Washington indicates by its *actions* a desire to follow the law of the land, a management system based on Washington's previously broken promise is not justified.

Washington's executive and judicial actions which seek to confront the federal courts in the exclusive federal area of treaty rights is unprecedented for over one hundred years.[8] As this court has reminded us in

[8] See Note 1.

*Missouri v. Holland*, 252 U.S. 416 (1920), a treaty made by the President with the required concurrence of two-thirds of the Senate is, under the supremacy Clause of Article VI §2, part of "The Supreme Law of the Land" which takes precedence over contrary state law.

Article III of the *Constitution* makes it just as clear that "all cases" "arising under treaties" are within the judicial power of the United States which is vested in the "Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." Washington's reliance on Article X to excuse this conflict is inapposite. Article X must give way to Article VI and Article III, which, with absolute clarity and without exception, hold that the federal courts shall determine treaty rights.

Washington, as a basis for this review, has readily admitted that it has been unable to protect the national interest in reserved treaty rights. This inability is coupled with lack of will. Therefore, the District Court has found it necessary to fashion a remedy to protect these fully litigated reserved rights. This Court has made it clear that the lower courts have a duty to fashion such a remedy. *Milliken v. Bradley*, 433 U.S. 267, 280 (1977); *Swan v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971); *Hecht Company v. Bowles*, 321 U.S. 321, 329 (1944); *Hutto v. Finney*, ___ U.S. ___ 46 L. Week 4817, 4819 (June, 1978).



The District Court accepted its responsibility. This Court should approve the District Court's limited action and call for continued District Court supervision until such time as Washington has demonstrated, not only its ability, but its willingness to implement the decisions of the federal courts in this area of national purpose.

## CONCLUSION

For the reasons expressed herein, review of the lower Courts determinations should be limited. The lower courts determination of the reserved treaty off-reservation fishing rights should be affirmed.

The lower courts allocation of the reserved treaty share of the resource should be affirmed.

The lower courts enforcement of its determination and allocation should be affirmed.

As a final note, we use the words of Yakima Chief Kamikan at the treaty grounds to indicate what general relief the Yakimas request: "Let them do as they have promised."

Respectfully submitted,

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Jan. 31, 1979

opposition

FOR ARGUMENT

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1978
No. 78-119

STATE OF WASHINGTON, et al.,
Petitioners.
vs.
UNITED STATES OF AMERICA, et al.,
Respondents,

No. 78-139

PUGET SOUND GILLNETTERS ASSOCIATION, et al.,
Petitioners,
vs.
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, et al.,
Respondents.

RESPONDENTS' CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON and CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION
BRIEF

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OPINION BELOW

The decision by the United States Court of Appeals for the Ninth Circuit in Puget Sound Gillnetters Ass'n v. U. S. Dist. Court, 573 F2d 1123 (9th Cir. 1978) involved a series of consolidated cases. Washington and non-treaty fishers appealed several decisions of the United States District Court for the Western District of Washington under its continuing jurisdiction in the "Puget Sound case" United States v. Washington, 384 F Supp 312 (WD Wa 1974), 520 F2d 676 (9th Cir 1975) cert den 423 US 1086 (1976) Also before the Court were petitions for writs of prohibition and mandamus against the Washington District Court and the Oregon District Court brought by non-treaty fishing associations challenging the underlying judgments. Finally, non-treaty fishermen appealed enforcement orders issued by the United States District Court for the District of Oregon under its continuing jurisdiction in the "Columbia River case," Sohappy v. Smith, 302 F Supp 899 (D Or 1969), to carry out the terms of a stipulated settlement agreed to by all parties and adopted by order of the Court. (A-3) The Ninth Circuit issued one opinion for the consolidated cases. The decision of the Ninth Circuit in the cases from Puget Sound are the subject of certiorari in Nos. 78-119 and 78-139 before this court. No party appealed from the decision of the Ninth Circuit as it related to the appeal and petition for writs in the Columbia River case. Therefore, this Court does not have before it any issue as to the validity of any proceeding in the Columbia River case. Pasadena City

Bd of Ed. v. Spangler, 427 US 424, 432, (1976). However, as a party respondent before the Ninth Circuit, the Confederated Tribes of the Warm Springs Reservation of Oregon and the Confederated Tribes of the Umatilla Indian Reservation are parties in this proceeding pursuant to Sup. Ct. R. 21.

## TREATIES INVOLVED

The Columbia River case involves four treaties between the United States and Indian tribes: Treaty with the Tribes of Middle Oregon, June 25, 1855, (12 Stat. 963); Treaty with the Yakima Tribe, June 9, 1855, (12 Stat. 951); Treaty with the Umatilla Tribe, June 9, 1855, (12 Stat. 945); and Treaty with the Nez Perce Tribe, June 11, 1855, (12 Stat. 957). Only the treaty with the Yakimas is also involved in the Puget Sound case but each of the treaties contain similar language concerning off-reservation fishing rights.

## STATEMENT OF THE CASE

Respondents believe that a statement of the case as to the Columbia River case is both relevant and pertinent in assisting this Court in a decision in the Puget Sound case and understanding how a decision in the Puget Sound case will impact the Columbia River case and most importantly as illustrating the only real means of settling this controversy.

Sohappy v. Smith, 302 F Supp 899 (D Or 1969) was orginally brought by the United States as plaintiff with only the



state of Oregon as defendant and was consolidated with a separate case brought by individual treaty Indians seeking similar relief. The four Columbia River treaty tribes, the Warm Springs, Yakima, Umatilla and Nez Perce, intervened. In its decision the District Court set forth standards to be applied by the state regulatory agencies in managing the fisheries resource such that the treaty tribes and their members:

> "***will be accorded an opportunity to attempt to take, at their usual and accustomed fishing places, by reasonable means feasible to them, a fair and equitable share of all fish which it permits to be taken from any given run." Sohappy v. Smith, Id. at 907.

The Court also retained jurisdiction to grant further or amended relief. No one appealed.

During the next several years there were many additional hearings in the Columbia River case. In each instance but one, where the Court reversed itself eight days later, the United States and the intervenor tribes prevailed and relief was granted. Oregon did not appeal any of these orders.

In the spring of 1974 Washington intervened as a party defendant. At the same time a dispute arose over the allocation of harvest opportunity on the 1974 spring run of Chinook salmon. The Court decreed that Indian treaty fishermen were entitled to have the opportunity to take up to 50% of the harvest of the spring Chinook salmon run des-

tined to reach the tribes' usual and accustomed fishing places. Both Oregon and Washington appealed and the Court of Appeals for the Ninth Circuit affirmed. Sohappy v. Smith, 529 F2d 570 (9th Cir 1976) Neither Oregon nor Washington appealed from that decision.

The controversy continued during the following years. Finally, at the urging of the District Court for Oregon, the parties to the Columbia River case entered into intensive and difficult negotiations and finally arrived at an agreement which was incorporated in a "Plan for Managing Fisheries on Stocks Originating from the Columbia River and its Tributaries Above Bonneville Dam" (Comprehensive Plan). (A-3-14) This plan was accepted and signed by the governors of Oregon and Washington and the leaders of the four Columbia River tribes as well as by the United States and was approved and adopted by court order on February 28, 1977. (A-3) This plan does not strictly follow the prior decrees of the Court in interpreting the extent of the treaty fishing rights but reflects a compromise accepted by all parties. Since the adoption of the Comprehensive Plan, the situation on the Columbia River has stabilized, although minor problems of enforcement remain. Puget Sound Gillnetters Ass'n v. U. S. Dist. Court, 573 F2d 1123, 1126 (9th Cir 1978).

In the fall of 1977, based upon the decisions of the Washington Supreme Court in Puget Sound Gilnetters Ass's v. Moos, 88 W2d 677, 565 P2d 1151 (1977) and Washington State Com'l Passenger Fishing Vessels Ass'n v. Tollefson, 89 W2d 276, 571 P2d 1373 (1977), Washington



officals refused to enforce regulations adopted by Oregon and Washington fishery regulatory agencies to carry out the terms of the Comprehensive Plan even though Washington, through both its governor and attorney general, had stipulated to the terms of the plan and had never raised any question in the Oregon District Court concerning Washington's authority to enter into the agreement and consent to the decree. Puget Sound Gillnetters Ass'n v. U. S. Dist. Court, supra at 1133.

Nontreaty fishermen, realizing that Washington would not enforce the regulations, commenced massive illegal fishing efforts in the Columbia River which would have deprived the treaty fishermen of their allocation under the Comprehensive Plan. Attempting to insure that the Comprehensive Plan would be carried out, both the United States and Oregon sought injunctive relief against nontreaty fishers and the enforcement orders issued by the District Court were the subject of appeals in the Ninth Circuit. The nontreaty fishermen also sought writs of prohibition and mandamus against the District Court challenging the terms of the Comprehensive Plan.

Before the Ninth Circuit, all of the parties to the Columbia River case, including Oregon, resisted the challenge to the Oregon District Court's orders except for Washington which took the extraordinary position that it had no authority to agree to the compromise settlement which the governor and the attorney general of that state had signed in 1977 (A-2, 15) and which

became a stipulated order of the Court. Oregon not only has accomodated itself to the decision and has never appealed to this Court for review but advocated the position adopted by the Ninth Circuit in the Columbia River case. No one petitioned this Court to review the portion of the Ninth Circuit decision pertaining to the Columbia River case.

ARGUMENT

While major factual differences exist between the Puget Sound case and Columbia River case, the key issue in each case is the interpretation to be given to the treaty language reserving fishing rights at all usual and accustomed fishing places "in common with citizens". Respondents Warm Springs Tribes agrees with the United States and the Puget Sound Tribes that United States v. Washington, 384 F Supp 312 (WD Wash 1974), 520 F2d 676 (9th Cir 1975), cert den 423 US 1086 (1976), was correctly decided and is not now subject to challenge and must be upheld. However, a major difference exists in the approach of the Oregon District Court from that of the Washington District Court and this Court may utilize the approach of the Oregon District Court in upholding the sanctity of the Indian treaties.

Since the beginning of the Columbia River case, the Oregon court has urged the parties to achieve an accomodation of this controversy. In his original opinion Judge Belloni said:

> "This court cannot prescribe in advance all of the details of



> appropriate and permissible regulation of the Indian fisheries, nor do the plaintiffs ask it to.***
>
> "I also do not believe that this court should at this time and on this record attempt to prescribe the specific procedures which the state must follow in adopting regulations applicable to the Indian fishery. The state must recognize that the federal right which the Indians have is distinct from the fishing rights of others over which the state has a broader latitude of regulatory control and that the Tribal entities are interested parties to any regulation affecting the treaty fishing right. Sohappy v. Smith, 302 F Supp 899, 911-12.

In its decree, the Oregon court left it to the parties to determine what the proper treaty share was, setting forth only guidelines and standards which must be applied to arrive at the "fair and equitable share".

In the spring of 1974, and following the decision in United States v. Washington, supra, the Oregon court did decree that the treaty Indians have the opportunity to harvest up to 50% of the spring chinook salmon run. Neither at that time nor any time prior to the adoption of the Comprehensive Plan did the Oregon court make any ruling with regard to excluding on-reservation, subsistence or ceremonial catch from counting toward the treaty Indian allocation. This order was based on the states' failure to present any other

option to the court. As the Ninth Circuit pointed out:

> The states, not the Indians, have the burden of establishing the respects, if any, in which the proposed allocation of future spring Chinook Salmon runs is inequitable or impracticable and of offering alternative allocation proposals which will as well or better protect the Indians treaty rights as defined by the 1969 decree and conserve this fish resource." Sohappy v. Smith, 529 F2d 570, 573.

Finally the Oregon court directed the parties to attempt to arrive at an agreement to settle this controversy. This resulted in all parties, including Washington, agreeing to the terms of the Comprehensive Plan which was adopted by the Court. The Oregon Court properly recognized that a controversy involving the racial, emotional and economic factors present in these cases can be solved only when the states themselves accept responsibility for caring out the terms of the Indian treaties. The Ninth Circuit recognized the wisdom of this approach when it concluded:

> "We do not entertain the illusion that this is the last appeal we will see in this case. The issues involved are too volatile and raise too many emotions for a mere statement of the law to resolve them. On the other hand, neither this court nor the district court has any desire to be a permanent fish-



> master in Washington waters. It is to be hoped that the parties can reach an agreement as they did in the Oregon case, and that Washington law will be changed to allow the state to carry it out. Until the state decides to cooperate, the district court will have to continue protecting the tribes' rights. The state and the fishers hold the key to lifting federal judicial interference with their fish-management perogatives." Puget Sound Gillnetters Ass'n v. U. S. Dist. Court, supra at 1133.

The Ninth Circuit has correctly observed a close analogy between these cases and the desegregation cases. Puget Sound Gillnetters Ass'n v. U. S. Dist. Court, supra at 1126. As with the desegregation cases, a weak and politically impotent minority has sought to protect its rights through the federal courts. No other avenue is available because of the political power of those opposing the rights. The decisions upholding treaty fishing rights have been extremely unpopular with the non-treaty fishermen and their governmental allies in the Northwest and have resulted in defiance of the Federal Court orders leading to the enforcement orders issued by both District Courts which were appealed in Puget Sound Gillnetters Ass'n v. U. S. Dist. Court, and to the Washington Supreme Court refusing to following the holding of the federal court on a matter of federal law. Puget Sound Gillnetters Ass'n v. Moos, supra, Washington State Com'l Passenger Fishing Vessels Ass'n v.

Tollefson, supra. Through this defiance of federal law, Washington and the non-treaty fishers have gained a foothold in this Court. These efforts should not be allowed to succeed. As this Court has held in the desegregation cases, "it should go without saying that the vitality of these constitutional principals cannot be allowed to yield simply because of disagreement with them." Brown v. Board of Education, 349 US 294, 300 (1955).

As in the desegregation cases, the state of Washington is going to extraordinary lengths to avoid implementation and recognition of the federally protected rights and thereby deny them. This Court has repeatedly struck down such attempts in desegregation cases. Wright v. Council of the City of Emporia, 407 US 451 (1972); United States v. Scotland Neck Board of Education, 407 US 484 (1972); Milliken v. Bradley, 418 US 717 (1974); and Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 US 1 (1971).

Washington's contended construction of the "in common with" language of the treaties would deny any purpose or meaning to that provision which all parties have recognized was of utmost importance to the Indians at the time the treaties were negotiated. It is obvious that if the state regulatory scheme allows all harvestable surplus of a run of fish in excess of the necessary spawning escapement to be intercepted prior to the time the run reaches the treaty Indians' usual and accustomed fishing places, this most important treaty provision would be stripped of



all meaning. Such would be an impotent result of the treaty negotiations and it cannot be envisioned that this is what the Indians expected from their negotiations. United States v. Winan, 198 U.S. 371, 380 (1905).

Washington's contention that by providing regulations equally applicable to treaty and non-treaty fishermen alike in areas under its jurisdiction it has satisfied the treaty obligation (Wash Br. 61) has no more validity than the separate but equal contention struck down by this Court in Brown v. Board of Education. Washington's plan is designed to totally deny the treaty fishing right by permitting interception of the fish before they reach the usual and accustomed fishing places of the treaty Indians. The fact that treaty Indians have the right, as citizens, to fish in other places does not justify the state's position. In short, the state's plan is not acceptable simply because it appears to be neutral in providing fishing opportunity. Swann v. Charlotte-Mecklenberg Bd. of Ed., supra at 23. The treaty provision requires that a segment of the run be allowed to reach the usual and accustomed fishing places to give the Indians the opportunity to harvest them. No other conclusion would give effect to the treaty. United States v. Winans, supra at 381.

It can be easily understood how the intransigence of Washington led to Judge Boldt's decree in the Puget Sound case. The attitude of Washington, supported by its non-treaty constituents, has been well documented by the Ninth Circuit. United States v. Washington, 520 F2d

676, 685, 693 (concurring opinion) (9th Cir 1975), Puget Sound Gillnetters Ass'n v. U. S. Dist. Court, supra at 1126 and United States v. Olander, _____ F2d _____ (9th Cir, decided September 7, 1978). Washington's long history of refusing to recognize treaty Indian fishing rights has led to many of the leading cases in this court upholding the special rights of the Indians. United States v. Winans, 198 US 371 (1905), Tulee v. Washington, 315 US 681 (1942), Puyallap Tribe v. Department of Game, 381 US 392 (1968), Department of Game v. Puyallap Tribe, 414 US 44 (1973), Puyallap Tribe v. Department of Game, 433 US 165 (1977). Washington continues to defy the Federal courts and has never presented to the Court any proposals for implementation of fishing regulations which recognizes the rights secured by the treaties. Under these circumstances, the District Court properly exercised its equitable powers and molded its decree to the necessity of the case. Swann v. Charlotte-Mecklenberg Bd. of Ed., supra at 15. In the absence of a solid affirmance by this Court, Washington will surely continue its course of systematically and illegally denying treaty fishing rights. Further, the opportunity for lasting settlement will be lost.

## THE HATCHERY FISH ISSUE

Most of the issues discussed in this appeal, other than the interpretation of the "in common with" language have no direct bearing on the Columbia River case. However, the hatchery fish issue has a great impact on the Columbia as hatchery-reared fish make a significant contribution to the Columbia



River salmon and steelhead resource. Washington's cursory and simplistic approach to this issue does not present its true importance to the Court. The circumstances concerning the contribution of hatchery fish to the resource are nearly as varied as the number of streams which produce these fish.

Prior to the adoption of the Comprehensive Plan, the District Court for Oregon never made any specific ruling concerning hatchery fish. The Comprehensive Plan specifically provides that hatchery fish shall be included in the allocations contained in the Plan. (A-5) The Columbia River tribes agree with the contentions of the United States and the Puget Sound tribes that the harvest opportunities decreed by the District Court includes hatchery-reared as well as naturally produced anadramous fish. An examination of the hatchery situation on the Columbia River illustrates why this is so.

Access of upstream migrant anadramous fish to spawning areas in the upper Columbia River and its tributaries is impeded by a series of hydroelectric dams, mostly federal, the most famous of which is Bonneville Dam. In connection with the authorization for the construction of these projects, the Congress has followed a clear policy of requiring protection and replacement of fishery resources destroyed by the developers of these projects. This policy is fully discussed in a comprehensive opinion by the Interior Department solicitor. 83 Interior Dec. 589, Opinion No. M-36885 (November 22, 1976)

This memorandum deals specifically with the authorization of the Bonneville Power Administration to expend funds for fishery protection and enhancement purposes. The memorandum notes:

> "The responsibility of developers and operators of hydro-electric power facilities to take measures to protect fish in the rivers of the United States from the effect of the operation of such facilities is a long standing policy of Congress." 83 Interior Dec. at 598 page.

The Solicitor noted that the Federal Power Act of 1920, 16 USC 811, not only authorized the Commission to require fishways but included other types of mitigation replacement and even enhancement. 83 Interior Dec. at 598-99 page. The Secretary of the Interior's trust responsibility for protection of Indian fishing rights from the consequences of hydro-electic developments was emphasized. 83 Interior Dec. at 599, 601.

The major hatchery developments on the Columbia River system have been federally financed pursuant to this stated Congressional policy. The hatcheries were constructed to mitigate the effects of the hydroelectric construction. Congress recognized that there would be severe adverse impacts on anadramous fish from these projects and appropriated funds to provide hatcheries and other measures to replace those fish lost due to the dams. It was intended to replace those fish lost for the benefit of those who had the right to enjoy them including the treaty Indians.



Thus, the Columbia River tribes are an intended beneficiary of these hatchery produced fish to the same extent as they have rights on the naturally spawned fish.

The parties to the Comprehensive Plan recognized this principle when they stipulated as a part of the Plan that hatchery fish would be subject to the same allocations as natural fish. (A-5)

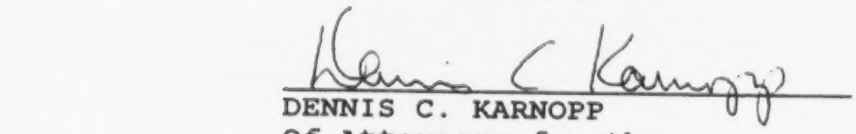
The situation of the hatchery fish on the Columbia River demontrates that there is no justification for Washington's contentions for wholesale exclusion of hatchery fish from the treaty Indian fishing opportunity.

## CONCLUSION

The Circuit Court must be affirmed. To do otherwise is to reward Washington and the non-treaty fishers for their blalant violations of federal law. Further, Oregon, which has not appealed and has attemped to comply with federal law and which supported the decision of the Ninth Circuit being reviewed as well as the Columbia River tribes, who have demonstrated the ability to achieve a voluntary settlement of this controversy will be penalized. Such a settlement is possible in the Puget Sound case but only if this court clearly and unequivocally requires Washington to obey the decrees of the lower Federal Courts. Washington must implement the orders of the lower Federal Courts unless and until it can present the Court with some alternative regulatory scheme which will give the rights of the treaty Indians

the recognition they deserve. In no event should the opinion of this court interfere with or draw into question the terms of the decrees in the Columbia River case or act as a roadblock to the future use of a negotiated settlement as a means of settling the Puget Sound case.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

| | |
|---|---|
| UNITED STATES OF AMERICA,<br><br>Plaintiffs,<br><br>v.<br><br>STATE OF OREGON,<br><br>Defendant,<br><br>and<br><br>THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON; CONFEDERATED TRIBES & BANDS OF THE YAKIMA INDIAN NATION; CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION; and NEZ PERCE TRIBE OF IDAHO,<br><br>Intervenors,<br><br>STATE OF WASHINGTON, | CIVIL NO. 68-513<br><br>MOTION |

Intervenor. . )

All parties hereby move this Court for an Order approving the Plan for Managing Fisheries on Stocks Originating from the Columbia River and its Tributaries Above Bonneville Dam, which is attached hereto as Exhibit "A."

DATED February 28, 1977.

Respectfully submitted,

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Of Attorneys for the Nez Perce Tribe of Idaho

/s/ Douglas R. Nash
Douglas R. Nash
Attorney for Umatilla Tribe

IT IS SO ORDERED.

/s/ ROBERT J. BELLONI
ROBERT J. BELLONI
United States District Judge

## A PLAN FOR MANAGING FISHERIES ON STOCKS ORIGINATING FROM THE COLUMBIA RIVER AND ITS TRIBUTARIES ABOVE BONNEVILLE DAM

The purpose of the plan shall be to maintain, perpetuate and enhance anadromous fish and other fish stocks originating in the Columbia River and tributaties above Bonneville Dam for the benefit of present and future generations, and to insure that the Nez Perce Tribe of Idaho, Confederated Tribes of the Umatilla Reservation, Confederated Tribes of the Warm Springs Reservation of Oregon, and the Confederated Tribes and Bands of the Yakima Indian Nation,

hereinafter called Tribes, having the right to fish based on a treaty with the United States are accorded the opportunity for their fair share of harvest, and to provide for a fair share of the harvest by nontreaty user groups.

This plan is based upon the unique circumstances relating to the Columbia River system and the parties hereto and does not necessarily have application in other fisheries.

The parties also recognize the substantial management problems resulting from the ocean harvest of mixed stocks of anadromous fish originating from the upper Columbia River and its tributaries and the wastage resulting from fishing on immature stocks. The parties will continue joint efforts to collect and gather data on this fishery and to reduce inefficient and wasteful harvest methods.

Due to the environmental factors totally unrelated to the treaty or nontreaty fisheries, there has been a continual decline of some runs of anadromous fish in the Columbia River system. This trend could deprive not only the treaty Indians, but also other user groups of the opportunity to harvest anadromous fish. The parties pledge to work cooperatively to maintain the present production of each run, rehabilitate runs to their maximum potential and to work towards the enhancement and development of larger and additional runs where biologically and economically feasible.



(1) The managing fishery agencies shall make every effort to allocate the available harvest as prescribed in this agreement on an annual basis. However, because run size cannot always be accurately calculated until some lower fishery has taken place, annual adjustment of the sharing formulas for each species may be required to provide the appropriate shares between treaty and nontreaty users. If treaty and nontreaty users are not provided the opportunity to harvest their fair share of any run as provided for in this plan, every effort shall be made to make up such deficiencies during the next succeeding run of the same race. Overall adjustments shall be made within a 5-year time frame.

(2) The treaty Indian tribes and state and federal agencies shall diligently pursue and promote through cooperative efforts the upriver maintenance and enhancement of fish habitat and hatchery rearing programs, and so far as practicable, maintain present productions of each run and to rehabilitate runs to their maximum potential.

(3) Hatchery salmon and steelhead released to maintain or restore runs above Bonneville Dam shall be shared pursuant to this plan.

(4) A technical advisory committee shall be established to develop and analyze data pertinent to this agreement, including but not limited to the following: calculated run size for all species of fish, ocean catches, escapement goals, catch allocation and adjust-

ments, dam loss, habitat restoration, and hatchery rearing programs. Such a committee shall make recommendations to the managing fishery agencies to assure that the allocating in this agreement are realized. Members shall be qualified fishery scientists familiar with technical management problems on the Columbia River. The committee shall be comprised of representatives named by each of the three states, Oregon, Washington, Idaho, National Marine Fisheries Service, U. S. Fish and Wildlife Service and each of the Indian Tribes.

(5) Each party shall develop a catch record program that utilizes reliable statistical methods and effective enforcement procedures as developed by the committee. Indian tribes shall report on appropriate state forms for each species ceremonial, subsistence and any other catch not sold to state-licensed buyers. The states shall report and make available to all interested parties treaty and nontreaty sport and commercial catch for each species. All the above reports shall be made within an agreed upon time schedule.

(6) The states agree to enact or recommend for enactment by the Pacific Fisheries Management Council appropriate conservation regulations for the ocean fishery that will assure an efficient utilization of stocks and will provide for adequate escapement of mature fish into the Columbia River to achieve the goals and purposes of this plan. Marine regulations should attempt to harvest mature fish and reduce waste.



(7) Fish escapement totals, dam loss estimates, or other technical aspects of this agreement may be modified by mutual agreement to reflect current data. In the event that significant management problems arise from this agreement that cannot be resolved by mutual agreement, the parties agree to submit the issues to federal court for determination. In any event, the Court shall retain jurisdiction over the case of U. S. v. Oregon, Civil 68-513, (D.C. Or).

(8) The sharing formulas as set forth in this plan are controlled upon the premise that the marine area catches in U. S. controlled waters of fish originating above Bonneville Dam, other than fall chinook and coho runs, will be regulated by PFMC so as to be essentially de minimis portions of those runs. The parties acknowledge that if subsequent data should indicate that this premise is incorrect, these formulas may require revision.

(9) Regulations affecting treaty users which are enacted in conformity with this comprehensive plan shall be considered as complying with the court's decrees enunciated in U. S. v. Oregon, Civil No. 68-513, District of Oregon.

(10) Tribal members fishing pursuant to this agreement may employ only members of the Tribes, while exercising their treaty fishing rights.

(11) All fish numbers referred to in this agreement are adult fish.

(12) The sharing formulas contained herein for determining the treaty fishery share refer to those fish caught in the Columbia River below McNary Dam and any other inland off-reservation catch placed in commercial channels.

Except as provided in subparagraph 5 under Spring Chinook, neither treaty nor nontreaty non-commercial harvest in tributaries, or in the mainstem Columbia River above McNary Dam, shall be considered in the sharing formulas contained herein.

(13) Upon thirty days written notice by any party, after five years from date, this comprehensive plan may be withdrawn or may be renegotiated to assure that the terms set forth represent current facts, court decisions, and laws.

## Fish Management Plan

A fish management plan has been adopted for those species of importance to assure future conservation of the resource and equitable sharing of the harvest between treaty Indians and nontreaty users. The formulas represent Available Fish for Harvest and may not reflect total catch if fishing effort is inadequate to harvest all available fish. All runs of fish described in this plan are those originating in the area of the Columbia River or its tributaries above Bonneville Dam.

### Fall Chinook Salmon

The Columbia River fall chinook shall be managed under the following plan:



(1) Run size shall be determined by the number of fish entering the Columbia River which are destined to pass Bonneville Dam.

(2) Escapement of 100,000 fish above Bonneville Dam shall be subtracted from total in-river run size.

(3) Additional fish above ascapement are available for harvest and shall be shared 60% by treaty fishermen and 40% by nontreaty fishermen.

(4) The states' goal is to manage the fisheries to provide and maintain a minimum average harvestable run size of 200,000 upriver fall chinook to the Columbia River.

(5) The 60% treaty share shall include mainstem ceremonial, subsistence, and commercial harvest as allocated by the Indian tribes. The 40% nontreaty share shall include in-river commercial and sport harvest as allocated by the appropriate agencies.

### Spring Chinook

The Columbia River spring chinook shall be managed under the following plan:

(1) Run size shall be determined by the number of fish entering the Columbia River destined to pass Bonneville Dam.

(2) Spawning escapement goals shall be a minimum of 120,000 and 30,000 fish above Bonneville and Lower Granite Dams respectively.

(3) The states' goal is to manage the fisheries to provide and maintain a minimum average run size of 250,000 upriver spring chinook to the Columbia River.

(4) Treaty ceremonial and subsistence catch shall have first priority. The fisheries shall not exceed a catch of 2,000 fish on a run size of less than 100,000 fish; 5,000 on a run size of between 100,000 and 120,000 fish; and 7,500 fish on a run size of between 120,000 fish and 150,000 fish. Treaty ceremonial and subsistence fishing for spring Chinook with gillnets as well as other normal gear may occur, but such gillnet fishing shall be subject to a notification system similar to that presently used for ceremonial fishing. All catches shall be monitored cooperatively for the purpose of ascertaining the amount of the catch.

(5) On a run size of between 120,000 and 150,000 fish passing Bonneville Dam, the nontreaty fisheries are limited to the Snake River system and may harvest fish which are in excess of the 30,000 spawning escapement passing Lower Granite Dam. (Under average river flow conditions, 120,000 fish at Bonneville Dam will generally provide 30,000 fish at Lower Granite Dam and 150,000 fish at Bonneville Dam will generally provide 37,500 fish at Lower Granite Dam.

(6) On a run size of more than 150,000 fish passing Bonneville Dam, all allocations as provided for in items 4 and 5 shall occur. All additional fish



available for harvest below McNary Dam shall be shared 40 percent for treaty fishermen and 60 percent for nontreaty fishermen. If river passage conditions improve so as to provide more than 40,000 fish at Lower Granite Dam on run sizes of 150,000 fish or less, the 40 percent and 60 percent allocation may occur on a run size of less than 150,000 fish at Bonneville Dam.

Summer Chinook Salmon

Summer chinook salmon runs are precariously low and do not warrant any fishery at the present time, with the exception of a treaty subsistence, ceremonial, and incidental catch not to exceed 2,000 fish during the months of June and July.

The parties agree that if the run size increases a formula for sharing of the available harvest above present escapement goals for this race shall be similar to spring chinook.

Summer Steelhead

(1) Run size shall be determined by the number of fish entering the Columbia River destined to pass Bonneville Dam.

(2) The escapement goal to spawning grounds above lower Granite Dam shall be a minimum of 30,000 fish. A run size of 150,000 fish at Bonneville Dam will provide for 30,000 fish at Lower Granite Dam.

(3) The treaty Indian mainstem fishery shall be limited to ceremonial, subsistence and incidental catch to other commercial fisheries. A minimum mesh restriction of 8 inches will be utilized to limit incidental catch.

(4) The Indian tribes recognize the importance of the steelhead stocks to recreational users and agree to forego a target commercial fishery.

Sockeye Salmon

Sockeye salmon runs are precariously low and do not warrant any fishery at the present time, with the exception of a treaty subsistence, ceremonial, and incidental catch not to exceed 2,000 fish.

The parties agree that if the run size increases so as to provide harvestable quantities, such harvest shall be shared equally between treaty and nontreaty fishermen.

The parties recognize the importance of protecting summer chinook and summer steelhead stocks during the harvest of sockeye salmon. Incidental catch of summer chinook and steelhead shall be minimized by providing appropriate restrictions to the sockeye fishery.

Coho Salmon

Coho stock are in the treaty fishing area simultaneously with other species which currently need protection from fishing effort. Parties agree to use their best efforts to develop methods to



maximize coho harvest while protecting those other species.

Shad

Shad runs have been sufficiently large to allow for unlimited harvest. However, because shad fisheries can take stocks of salmon and steelhead that are below harvestable levels, new catch methods shall be pursued particularly by the Indians above Bonneville Dam to assure a sufficient catch of shad while minimizing the catch of other species. If escapement goals and catch formula must be established in the future, the committee shall compile the required data and make recommendations to the managing fisheries agencies.

Sturgeon

The population of sturgeon in the Columbia River appears residual above Bonneville Dam. The parties agree that the Indian tribes shall have a commercial fishery regulated by sound principles of conservation and wise use. A sport harvest may occur simultaneously for sturgeon above Bonneville Dam.

Winter Season

The treaty fishermen shall be allowed a mainstem commercial fishery for any species of fish between February 1, and April 1.

This comprehensive plan for managing anadromous fisheries on stocks originating from the Columbia River and its tributaries above Bonneville Dam is

adopted by the undersigned this 25th day of February, 1977.

/s/ Robert W. Straub
ROBERT W. STRAUB
Governor of Oregon

/s/ Dixy Lee Ray
DIXY LEE RAY
Governor of Washington

CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON

/s/ Harold Culpus
HAROLD CULPUS

/s/ Watson Totus
WATSON TOTUS

CONFEDERATED TRIBES & BANDS OF THE YAKIMA INDIAN NATION

/s/ Leslie Minthorn
LESLIE MINTHORN

CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION

/s/ Richard A. Halfmoon
RICHARD A. HALFMOON
CHAIRMAN, NEZ PERCE TRIBE OF IDAHO

/s/ Alta A. Guzman
ALTA A. GUZMAN, SECRETARY
NEZ PERCE TRIBE OF IDAHO

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